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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 672

JOSEPH PORETTO; JOSEPH MARCELLO, JR.; Natural persons, doing business as NOLA PRINTING COMPANY,
Petitioners,

v.

CHESTER A. USRY, DIRECTOR OF INTERNAL REVENUE (District of Louisiana), *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

CHESTER A. USRY, DIRECTOR OF INTERNAL REVENUE (District of Louisiana), *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners seek a writ of certiorari to the United States Court of Appeals for the FIFTH CIRCUIT, to review its decision, which is hereto annexed as *Appendix I.*

That decision affirmed dismissal by the United States District Court for the Eastern District of Louisiana of the suit by petitioners against respondent. The order of dismissal and reasons given for it will be found hereto annexed as *Appendix II.*

The judgment of dismissal in the district court was entered on 7 October 1960 and that of the appellate court affirming dismissal was entered on 20 October 1961. Rehearing was not sought below; nor was extension of time within which to file this petition.

The decision below is reviewable by writ of certiorari from this Court under the provisions of *28 USC 1254 (1)*. Jurisdiction of this Court is invoked on grounds of inadequate prior and impartial hearing to test validity of penalty asserted against petitioners under presumed authority of taxing statutes, all within the scope of Federal excise tax.

QUESTIONS PRESENTED

The essential questions to be resolved in considering this cause are:

A. Is the decision below in conflict with established judicial procedure?

B. Is respondent required, under the terms of *26 USC 6404*, to act on claims in abatement respecting this type of Federal excise tax before proceeding summarily?

C. Where willfulness in failure to collect from others is essential to liability for statutory penalty as excise tax, may the respondent determine such penalty unilaterally without review before finality?

D. Does the absence of specific statutory forum for prior impartial hearing on liability under the internal revenue laws require judicial consideration before finality under provisions of *5 USC 1009*?

STATUTES INVOLVED

The pertinent sections of the law involved here are annexed as *Appendix III*. They are:

Internal Revenue Code of 1954—

26 USC 4251, Incidence of the tax
4291, Method of collection
6404, Abatement of excessive tax
6672, Incidence of penalty
7421(a), Prohibition against restraint

These internal revenue law sections appear, likewise, in the 1939 IRC, but under differing section numbers. Since they were brought over into the 1954 IRC, they are not here referred to as having their source in 1939 IRC, although some of the years involved were administered under that code.

Administrative Procedures Act of 1946, hereto annexed as Appendix IV—

5 USC 1009(a)-(c)

STATEMENT

The question brought here arose from demands by by respondent for penalty on failure of petitioners to collect from others certain Federal excise tax on communications known as facilities and services. Petitioners had filed returns respecting such matters through part of 1953, but later advised respondent that was a mistaken action, and sought refund of that then paid. Respondent made his demand respecting similar tax for the period 1953-1958, and rejected the claim for refund as out of time due to statutes of limitations. Petitioners filed their protest with respondent against his demands, the text of which is shown in *Appendix*

V, hereto annexed. Respondent afforded petitioners a hearing before one of his officers, without any change in his demands, and petitioners insist that he would divulge no single instance of taxable service for them to verify. Respondent then assessed the demands as penalty on petitioners for having failed to collect that which he said should have been collected. Petitioners filed their claim in abatement against the assessment, the text of which is as shown in *Appendix VI*, hereto annexed.

While the claim for abatement was pending before respondent, he commenced summary collection processes, and petitioners resorted to the United States District Court for an order to require that respondent show cause for his assessment.

Except for the fourth sentence in the opinion of the Court of Appeals (Appendix I, *infra*) the procedural matters are stated in the second paragraph of that opinion. The excepted sentence reads as follows:

> "... The company or furnisher of the information is required to collect certain taxes levied against the users or customers ..."

As a statement of one effect of the tax statutes, petitioners accept the sentence, but reject it as applicable to them.

Petitioners, having duly and seasonably denied taxable status and cited documentary references to the same, and having duly filed their claim for abatement of the demand, resorted to the judiciary in an undertaking to halt summary process against them without a hearing. They relied for jurisdiction below on the provisions of *28 USC 1340*, the specific requirements of *5 USC 1009(a)-(c)* and the requirements of due process which they claimed were denied them.

REASONS FOR GRANTING THE WRIT

A. The decision below, with deference, is in conflict with decisions on substantially the same facts out of this Court and, indeed, out of the Court below; *e.g.*, *Miller* v. *Standard Nut Margerine Co.*, 284 US 498 (52 S Ct 260). It is clear, thus, that the opinion reference below to the prohibition contained in 26 USC 7421(a) as basis for excluding petitioners from judicial supervision over the question in these circumstances is in conflict with established judicial procedure. The authorities cited in both decisions below, with deference, are not really the governing law in situations such as this and, with respect, do not support the opinion for which they are brought forward.

B. Construction below of the language "is authorized" from the provisions of *26 USC 6404* to be permissive and, presumably, closely akin to discretionary, is in conflict with the decisions of this Court under which the practice has operated for ages. Wherever such language is applicable in cases involving benefits to private persons, it has been uniformly observed to be compelling. Of course, petitioners concede that, where applicable only to internal affairs of agencies it is permissive. Not so, here, however, because the statute refers to excessive taxes and petitioners presented a claim which, if true, would require abatement. They were denied prior determination of the excessive character of the assessment, which was unjust because excessive taxes should be abated and not collected forcibly.

Here, though, while the claim for abatement was before the respondent, he commenced his summary collection processes. Where the tax be shown to be excessive, it becomes the duty of the supervising agency

to abate it. This, petitioners contend, is enforceable by judicial supervision, and the contrary decision is in conflict with the established rule. *Mason* v. *Pearson*, 9 How (US) 248 (13 L ed. 125) *Butterworth* v. *United States*, 112 US 50 (5 S Ct 25) (28 L ed. 656)

C. Denial to petitioners—by the decision below—of a forum in which to test the validity of that asserted against them as penalty alone was in direct conflict with the accepted rule as announced by this Court and maintained over the years. *Central of Georgia Ry. Co.* v. *Wright*, 207 US 127 (28 S Ct 47) (52 L ed. 134) *Panama Refining Co.* v. *Ryan*, 293 US 388 (59 S Ct 241) (79 L ed. 446) (92 Cong. Rec. 2195, 2200-2201) While the administrative use of tax laws to enforce criminal code provisions is not here present, the two comprehend the same restrictions against arbitrary action under the name of taxation. *Lipke* v. *Lederer*, 259 US 557, 562 (42 S Ct 549) (66 L ed. 106)

D. This petition presents a large question of law having wide public interest in that it requires determination of the extent to which the provisions of the Administrative Procedures Act of 1946 are available to the public, in absence of specific statutory forum for resolution of certain tax demands, including this type. *5 USC 1009(a)-(c)*

It is generally recognized that Federal taxes, such as income, gift and estate taxes, may be finally determined through petition to The Tax Court of the United States before the assessment becomes a final one. That is generally considered to reflect the common understanding of an impartial but prior and adequate hearing to vouchsafe protection against arbitrary administrative action as to taxation. Alter-

natively, of course, taxpayers may pay and sue for refund.

The decision below, with deference, has as its crux the doctrine that excise taxes may be treated only under the pay and sue doctrine. Petitioners assert that Congress intended the Administrative Procedures Act to fill such void as that caused by lack of prior, impartial review provision concerning excise taxes. Appreciating as they do that silence of Congress as to a forum will not in itself justify judicial provision of such, they urge that the whole statutory scheme contemplated resort to the judicial supervision here. *Estep v. United States*, 327 US 114 (66 S Ct 423) (90 L ed. 567) *Stark v. Wickard*, 321 US 288, 308, 309 (64 S Ct 559) (88 L ed. 733)

CONCLUSION

Petitioners assert with confidence that there are no decisions from this Court which define the law, or adequate procedure under the law, in conformity with the decision below. On the contrary, with deference, such decisions are uniformly against that decided below. The cited statutes show plainly that only things certain and identifiable are subjected to the penalty here in controversy. The taxing scheme of this country, where pertaining to the tax itself, or sanctions under the statute, is premised on the proposition that every taxpayer, or those made such by operation of law, shall know the content of that asserted against him. The due process provisions of the law contemplate certainly that they shall have adequate opportunity to know that, and turn away from excessive authoritative actions in the executive department of government. Only judicial supervision will supply the want of that in this cause.

WHEREFORE, premises considered, petitioners pray that the writ be granted and that, on final hearing, if it be determined that the decision below did not follow the intendment of the law, the petitioners be granted the relief of reversal thereof with instructions to assure full due process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the within petition has been served on respondent by depositing copies thereof in the United States mails, first-class postage by air mail fully prepaid, addressed to counsel for respondent at the last known address of said counsel, as follows:

The Honorable, United States Solicitor General,
Department of Justice, Washington 25, D. C.

William A. Friedlander, Esquire,
Attorney, Department of Justice,
Washington 25, D. C.

HILARY J. GAUDIN

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18645

JOSEPH PORETTO; JOSEPH MARCELLO, JR.; Natural persons d/b/a NOLA PRINTING COMPANY, *Appellants*,

versus

CHESTER A. USRY, DIRECTOR OF INTERNAL REVENUE, *Appellee*.

Appeal from the United States District Court for the Eastern District of Louisiana

(October 20, 1961)

Before TUTTLE, Chief Judge, CAMERON, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This case concerns the procedure available to a taxpayer to contest an administrative determination of the District Director of the Internal Revenue Service involving an excise tax assessment carrying a penalty. The taxpayers appeal the dismissal of their action for an abatement of the taxes assessed against them, asserting that they have been denied their day in court. We affirm the dismissal below. The appellants must seek vindication of their rights through the regular "pay and sue" procedure established by Section 7422 of the Internal Revenue Code of 1954.

Joseph Poretto and Joseph Marcello, Jr., operate a business in Jefferson Parish, Louisiana, under the name of "Nola Printing Company". They characterize it as a printing and news service; the District Director of Internal Revenue characterizes it as a "wire service". Such companies furnish up to the minute information to their customers. The company or furnisher of the information is required to collect certain taxes levied against the users or

customers. The source of this litigation is a dispute whether the Nola Printing Company comes within the statutory definition of a taxable service. If so, they were required by Sections 4251 and 4291 of the Internal Revenue Code of 1954 (Sections 3465 and 3467 (b) of the 1939 Code) to collect certain excise taxes from their customers. This the taxpayers did for part of 1952 and for 1953. On the advice of new tax advisors, they did not file excise tax returns for 1954 or the following years. In 1955 the District Director called attention to their failure to file. The taxpayers then notified the Director that they did not conduct a taxable service. Shortly after, they filed a claim for refund of the taxes paid for 1952 and 1953; the claim was rejected because of the Statute of Limitations. July 22, 1960 the District Director notified the taxpayers that their business constituted a communication facility subject to the provisions of Section 4251, that they had willfully failed to collect the excise taxes for the periods ending February 28, 1954 through December 31, 1958, as required of them by Section 4291, and that they owed a penalty of $58,979 under Section 6672. The Director notified the taxpayers that he had enrolled liens against their property and had levied on their banking facilities.

August 5, 1960 the taxpayers filed a suit in the District Court for the Eastern District of Louisiana entitled "Petition for Order to Show Cause why Federal Excise Tax Penalty Demand and Assessment should not be Abated and Suppressed". The Director moved to dismiss the petition on the ground that the district court has no jurisdiction to entertain a summary proceeding or to give equitable relief against the assessment or collection of taxes when there is an adequate remedy at law. The trial judge granted the motion for dismissal. The taxpayers appealed.

The taxpayers contend that under Section 6404 the District Director is obliged to abate an unlawful assessment and that his refusal to do so gives them a right to sue for

a judicial determination of the validity of the administrative action. They support this contention with a variety of arguments. They argue that since the tax is a penalty it requires a finding of willfulness. They say that there is no other avenue open to them to contest the tax; without the relief sought they will be without their day in court and will be deprived of property without due process of law. They assert that since the penalty is against them (not the customers) for not having collected and paid over a tax owed by other taxpayers, it is very doubtful that they would be entitled to obtain recourse under the normal "pay and sue" procedure of Section 7422. They urge that immediate relief is necessary, because they will not have any recourse against their customers for these taxes and because they will not be able to deduct the penalty taxes as a business expense.

This case is not as unusual as the appellants seem to think. The governmental necessity of administering the assessment and collection of taxes in an orderly manner sets a tax claim of the sovereign apart from ordinary claims of the government and apart from claims of private litigants. Nevertheless there are established procedures for settling tax disputes with special immediate relief in the proper case.

Appellants misconceive both the availability of relief under the usual procedures and the nature of the abatement procedures of Section 6404. It is clear that appellants will be able to test the merits of the tax in a suit for a refund. Section 7422 specifically includes within its coverage suits for recovery of "any penalty claimed to have been collected without authority." In *Wilmette Park District v. Campbell*, 1949, 338 U. S. 411, 70 S. Ct. 195, 94 L. Ed. 205, the Supreme Court expressly held that where a party has paid a penalty for the failure to collect and pay over taxes it has standing to sue for a refund. Not only is this means of redress available; it is mandatory and exclusive

under a long line of cases holding that the system prescribed by the United States for the collection of taxes by stringent measures and with appeals to specified tribunals to recover moneys illegally exacted is "a system of corrective justice designed to be complete and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues." *Graham v. DuPont*, 1923, 262 U. S. 234, 255, 43 S. Ct. 567, 67 L. Ed. 965, 967; *Snyder v. Marks*, 1883, 109 U. S. 189, 3 S. Ct. 157, 27 L. Ed. 901; *Cheatham v. United States*, 1876, 92 U. S. 85, 23 L. Ed. 561.

Section 6404 does not impose a duty on the District Director to abate improper assessments, thereby providing a basis for a taxpayer summary action challenging the director's refusal to abate an allegedly incorrect assessment. Its thrust is permissive, not mandatory. Its language reads, "[t]he Secretary or his delegate *is authorized to* abate" excessive assessments. Accordingly, the Treasury Regulations under this provision provide that the "district director *may* abate any assessment, or unpaid portion thereof, if the assessment is in excess of the correct tax liability . . . " Treas. Reg. 301.6404-1 (a) (1954). In this context we must interpret the terms "*is authorized to*" and "*may*" as creating an option to act but not a duty to do so. The absence of any other language in Section 6404 suggesting the imposition of a duty on the district director and the existence of a separate and complete procedure expressly provided under Section 7422, by which the taxpayer may protest the tax levied upon him, support this construction. There is a total absence of any cases construing Section 6404 as providing an opportunity for taxpayers to challenge and obtain a judicial review on the merits of a tax assessment against them.

The Government's argument that the appellants must seek their relief through the established "pay and sue" pro-

cedures is buttressed by Section 7421(a). That provision expressly declares that, with certain exceptions not relevant here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The purpose of this section is to prevent judicial interference with the administrative system of tax collections of funds necessary to government operations and to restrict judicial review of the tax assessments and collections to the procedures expressly provided. Since the relief sought by appellants is essentially to restrain collection of the taxes assessed against them, their case falls within this ban. *See Graham v. Du Pont*, 1923, 262 U. S. 234, 43 S. Ct. 567, 67 L. Ed. 965; *Missouri Valley Intercol. Ath. Ass'n v. Bookwalter*, 8 Cir., 1960, 276 F. 2d 365.

The appellants support their quest for extraordinary relief by appealing to the doctrine of *Miller v. Standard Nut Margarine Co.*, 1932, 284 U. S. 498, 52 S. Ct. 260, 76 L. Ed. 422. See also *Enochs v. Williams Packing & Navigation Co.*, 5 Cir., 1961, 291 F. 2d 402; *Lassoff v. Gray*, 6 Cir., 1959, 266 F. 2d 745. But this relief is usually restricted to a case in which it is charged that the threatened exaction is illegal and when the amount of the assessment is so great in relation to the assets of the taxpayer that to require payment of the tax would force a distress sale of assets or other dislocation that could not be repaired by a refund if the tax were later found to have been erroneously collected. In the three cases cited the court found that payment of the tax would ruin the taxpayer. In numerous other cases this Court has refused to intervene. *McDonald v. Phinney*, 5 Cir., 1961, 285 F. 2d 121; *United States v. Card*, 5 Cir., 1958, 257 F. 2d 347, cert. denied, 358 U. S. 920, 79 S. Ct. 290, 3 L. Ed. 2d 239; *Darnell v. Tomlinson*, 5 Cir., 1955, 220 F. 2d 894; *Tomlinson v. Poller*, 5 Cir., 1955, 220 F. 2d 308, cert. denied, 350 U. S. 832, 76 S. Ct. 66, 100 L. Ed. 742.

The appellants allege no facts entitling them to relief. In fact, they have not shown that the payment of the assess-

ment would create any hardship at all. They say that it is rough to pay the penalty, because they could not deduct the payment as a business expense. That, however, is a consequence of the tax itself, not of the procedure for collection and protest. If the tax is valid, the taxpayer should not be able to claim it as a deduction; if the tax is invalid, the taxpayers will recover it in a refund suit. Similarly, with regard to the alleged lack of recourse against their customers, the taxpayers' position may be affected by the outcome of their challenge to the tax but not by the timing and procedure allowed for the trial of their challenge. The appellants do not contend that the they are unable to pay the tax or that they would be irreparably injured or even severely damaged by having to pay before lodging their appeal. Their only hardship seems to be that they, like many another, do not wish to part company with cash until they are sure they owe the tax. Unfortunately for the appellants, in the tax field Congress has subordinated utopian solutions to the needs of financing governmental operations and of conducting tax collections and determinations by orderly established procedures. In this workaday world those procedures provide taxpayers with an adequate remedy. They must content themselves with it.

The judgment is

Affirmed.

CAMERON, Circuit Judge, Concurs in the result.

APPENDIX II

Order Granting Defendant's Motion to Dismiss

MINUTE ENTRY October 7, 1960 Wright, J:

(Number and Title Omitted)

This case came on for hearing on defendant's motion to dismiss. The court, having heard the argument of counsel and studied the briefs submitted in support thereof, is now ready to rule.

IT IS ORDERED that defendant's motion to dismiss be, and the same is hereby, GRANTED.

REASONS

1. Petitioner have an adequate remedy at law. 1954 I.R.C. § 7422.

2. Insofar as this petition would have the court declare the assessment to be arbitrary and of no effect, it is a prohibited action for declaratory judgment with respect to federal taxes. 28 U.S.C. § 2201.

3. Insofar as this petition would have the court in effect restrain the collection of internal revenue taxes, it is barred by 1954 I.R.C. § 7421.

4. The rigor of the cited statutes is relaxed only where there are "compelling circumstances having some reasonable resemblance to traditional notions of equity which indicate persuasively that there is no other adequate remedy, and that for unusual and extraordinary circumstances an irretrievable injustice would be done" were the summary relief sought not granted. *United States* v. *Card*, 5 Cir., 257 F. 2d 347, 350, and cases there cited at Page 351. See also, *New Hampshire Fire Insurance Company* v. *Scanlon*, 362 U.S. 404. Such circumstances are not here disclosed.

J. S. W.

Judgment

(Number and Title Omitted.) (Dated: October 19, 1960)

This cause having been heard at a former day on the motion of the defendant to dismiss, and the court, after due consideration thereof, having granted said motion;

IT IS ORDERED, ADJUDGED AND DECREED that judgment be, and is hereby entered, in favor of the defendant, Chester A. Usry, Director of Internal Revenue, and against the plaintiffs, Joseph Poretto, et al, dismissing this suit, with costs.

J. S. W.

APPENDIX III

INTERNAL REVENUE CODE OF 1954

(26 USC)

(Source: USC 1952 ed. Supp. II)

§ 4251—Imposition of the Tax

There is hereby imposed on amounts paid for the communications services or facilities enumerated in the following table a tax equal to the percent of the amount so paid as is specified in such table:

Taxable Service	Rate of Tax
	Percent
Local telephone service	10
Long distance telephone service	10
Telegraph service	10
Leased wire, teletypewriter or talking circuit special service	8

The taxes imposed by this section shall be paid by the person paying for the services or facilities.

§ 4291—Cases Where Persons Receiving Payment Must Collect Tax

Every person receiving any payment for facilities or services on which a tax is imposed upon the payor thereof under this chapter, shall collect the amount of the tax from the person making such payment, except that if the payment specified in Section 4261 is made outside the United States for a prepaid order, exchange order, or similar order, the person furnishing the initial transportation pursuant to such order shall collect the amount of the tax. For the purpose of this section every club or organization having life members shall collect the tax imposed on life memberships by Section 4241.

§ 6404—Abatements

(a) General Rule.

The Secretary or his delegate is authorized to abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which—

(1) is excessive in amount, or

(2) is assessed after the expiration of the period of limitation properly applicable thereto, or

(3) is erroneously or illegally assessed.

(b) No Claim for Abatement of Income, Estate and Gift Taxes.

No claim for abatement shall be filed by a taxpayer in respect of an assessment of any tax imposed under subtitle A or B.

(c) Small Tax Balance.

The Secretary or his delegate is authorized to abate the unpaid portion of the assessment of any tax, or any liability in respect thereof, if the Secretary or his delegate determines under uniform rules prescribed by the Secretary or his delegate that the administration and collection

costs involved would not warrant collection of the amount due.

§ 6672—Failure to Collect and Pay Over Tax, or Attempt to Evade or Defeat Tax

Any person required to collect, truthfully account for and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under Section 6653 for any offense to which this section is applicable.

§ 7421—Prohibition of Suits to Restrain Assessment or Collection

(a) Tax.

Except as provided in Section 6212(a) and (c), and Section 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

APPENDIX IV

ADMINISTRATIVE PROCEDURE

(5 USC)

§ 1009—Judicial Review of Agency Action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Proceedings.

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate and exclusive opportunity for such review is provided by law.

(c) Acts Reviewable.

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

APPENDIX V

INTERNAL REVENUE SERVICE

New Orleans, Louisiana

JOSEPH PORETTO, 530 Iris Ave., New Orleans 21, La.
DBA NOLA NEWS (Partnership)

PROTEST

Proposed adjustment letter, June 29, 1959, A:CR:R

Taxable periods: Fiscal Years Feb. 28, 1953 thru Feb. 28, 1958; and period March 1, 1958 thru December 31, 1958.

Exceptions to proposed adjustments:

(a) Nola News filed returns mistakenly, thought to be required, by the applicable statute for the fiscal years ended February 28, 1953 and March thru December 1953, paying excise tax thereon, though none was required of the taxpayer for such periods.

(b) Nola News has not been subject to the statutory requirements as to excise tax computed under provisions of Section 4252, IRC 1954, (Section 3465, IRC 1939.)

(c) Nola News is not subject to assessment or collection procedure described in Section 6672, IRC 1954, or its companion Section in the 1939 IRC.

(d) The proposed adjustments are admitted to be a penalty and not a tax, thus unjustly seeking to deprive taxpayer of rights and property without due process of law.

(e) Information relied upon in the proposal, and the procedures under which the same was sought wrongfully to be used, were wrongfully obtained and erroneously applied.

FACTS IN SUPPORT OF THE ERRORS THUS ASSIGNED, ARE:

(a) (1) Nola News bought the operation of its predecessor and, until the end of 1953, filed returns and paid excise taxes as here described on the same basis as had been done by the predecessor, without verifying the facts on which such had been done.

(2) (A) When such verification was made, it was discovered that such returns and payments had been in error, since Nola News rendered no service so returnable or taxable; similarly, Nola News has furnished no service as contemplated by the statute and has had no revenues, collections or income from any such service furnished, provided or in any way connected with Nola News or any person related to Nola News.

(B) Your office was so advised in writing under date of February 2, 1955, responding to your inquiry of January 19, 1955, following conference of December 15, 1954, symbols: DIR-C-RP-720 D. Prior to that correspondence you were so advised orally.

(3) The only service of any kind in which Nola News participates, or from which said taxpayer is beneficiary in any manner is of two kinds, namely:

(A) Nola News is one of a number of subscribers in the New Orleans Area to a Western Union ticker service, from which Nola News receives information on the outcome of sports events, such as football, baseball, or basketball games, that information being transposed into published daily—except Sunday, sports information bulletins.

(B) Information on the results of other sport events, respecting which persons may call by telephone to Nola News and learn of such results; this service is received by Nola News from toll service Public Utility telephone lines, on circuits connected and terminated for each such report separately and independently; the information received by or given to those calling Nola News is given separately

for each connection made for such purpose independently over regular subscriber telephone circuits (local) or over regular operator-placed individual tolls calls by regularly established telephone service.

(c) These circumstances here described have prevailed without exception for the taxable periods here involved.

(b) The circumstances prevailing, as aforesaid, there has been no applicability of Section 4252, IRC 1954 or Section 3465, IRC 1939.

(c) Similarly, the statutory provision for collecting such tax from the liable taxpayer who fails to collect from the user, is not applicable, there being no users as contemplated by statute and no such service.

(d) Nola News has paid regularly, as a part of its payment for telephone service, the 10% excise tax required of telephone users generally. The gross income of Nola News is about equally separable between that from customers or clients calling in by long distance or toll service, and that from those using various telephones through the local or nearby parish telephone exchanges not involving toll service. The latter category of revenues is derived fractionally from those who call Nola News and those who, at the request of such customers, are called on occasion by Nola News. This proposed adjustment, stating as it does, that it is a penalty, seeks to tax Nola News in its regularly reported income, as shown by its income tax returns, a second time under guise of an excise tax, when such income as not derived from the privilege calling for the excise tax, but from personal services, by use of the public service telephone system, and thereasto fully taxed and paid by Nola News to said telephone company. The tax here sought, being not alone illegal but unlawful, in that the judicial interpretations by the judiciary declare it may not be so done, is attempted violation of the due process rights of the taxpayer, particularly the rights conferred by Section 7214, IRC 1954.

(c) Representatives of the Internal Revenue Service broke into the private premises of Nola News, smashed windows and damaged other property, under authority of a search warrant wrongfully obtained without notice to Nola News, abused the personnel of the taxpayer, searched their persons, removed their property and have made no return on the warrant so wrongfully obtained, all which added nothing to the examination not already fully shown in the returns, based on the examined books and records of Nola News. Attempted imposition of the penalty as now proposed is obvious support of the wrongfully obtained search warrant and the general pattern of conduct therewith associated and from which such warrant was inspired. The search warrant having disclosed no evidence to support the grounds on which that warrant was sought and granted, this attempted penalty is nothing except an unwarranted retaliation for such failure, which was not a fault of Nola News, since there never was any basis for seeking the warrant. The income tax liability of Nola News was thoroughly examined and only negligible changes were made in the returns as filed.

The proposed adjustment is in all respects wrong and should be vacated. All the facts herein advanced have been exhibited to and examined by your representatives prior to the date of the proposed adjustments here protested. These citations are supplemental to those advanced in the informal conferences.

This protest is presented by counsel for the taxpayer, power of attorney for which has been duly filed. The said facts are true and correct from personal knowledge of the said attorney, except as to those based on information and belief from the books and records of the taxpayer, which said attorney verily believes are true and correct.

HILARY J. GAULIN,
Hilary J. Gaulin,
Attorney for Taxpayer

APPENDIX VI

FORM 843 (Rev. Mar. 1939)

U. S. TREASURY DEPARTMENT INTERNAL REVENUE SERVICE

CLAIM

TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

District Director's Stamp
Date received

The District Director will indicate in the space above the kind of claim filed and fill in where required

- [ ] Refund of Taxes Illegally, Erroneously, or Excessively Collected
- [ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess
- [ ] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes)

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps
Joseph Perretta, et als; dba [illegible]

Number and street
530 Iris Avenue

City, town, postal zone, State
No Orleans, 21, Louisiana

Fill in applicable items—Attach letter size sheets if space is not sufficient

District in which return (if any) was filed
Return not filed (Louisiana, if filed)

Name and address shown on return, if different from above
No return filed

1. Period for which assessment was made (prepare separate form for each taxable period)
From 2-48 To 12-31 (not applicable)

2. Kind of tax
Excise penalty Communications, Facilities and Service

3. Amount of assessment
$ 57,070.06

4. Dates of payment
Not paid

5. Date stamps were purchased from the Government

6. Amount to be refunded
$ None

7. Amount to be credited (not applicable to income estate or gift taxes)
$ 57,070.06

8. The claimant believes that this claim should be allowed for the following reason:

a. The assessed tax is not applicable to any business done by taxpayers during the subject period.
b. Taxpayers have advised in writing more than once that returns would not be filed, stating that service once taxable has been discontinued in 1952.
c. Acts or alleged facts used as basis for the assessment were obtained by use of illegal search and seizure and by arbitrary and erroneous interpretation of such facts, all in violation of Section 7214(a)(8), I.R.C.
d. There is no single instance of taxable service, and this fact is well known to Internal Revenue Service.
e. Taxpayers are denied due process of law and other constitutional rights by this assessment.

I declare under the penalties of perjury that this claim, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief is true and correct.

Signed

Date

INSTRUCTIONS

The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

If a joint income tax return was filed for the year for which this claim is made, husband and wife must sign the claim even though only one had income.

Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer must accompany the claim.

If a refund is filed by or on behalf of a transferee, trustee, or legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claims are filed by the same fiduciary, documentary evidence in support of the said authority need not be submitted in connection with such claims, provided a statement is made in the claim showing that such evidence has been furnished and that the authority is still in force.

Where the taxpayer is a corporation, the claim must be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

If the claim is for an overassessment of income, war profits, or excess profits taxes, including any interest collected thereon, the taxpayer must set forth in detail the computation of such overassessment in item 8. The net income, war profits, or excess profits taxes as previously determined, and the net income, war profits, or excess profits taxes as they should be computed, must be stated in such manner as clearly to show the nature and amount of each item of gross income, deduction, credit, or tax which is claimed to have been erroneously included or omitted in the return as previously determined.

If the claim is for an overassessment of income, war profits, or excess profits taxes based upon the deduction of bad debts, the nature of the debts, the consideration therefor, the time when ascertained to be worthless, and the action taken by the taxpayer with respect thereto must be fully set forth in a statement attached to and made a part of the claim. If the deduction is claimed by the executor of the estate of a deceased taxpayer, a statement must be attached showing fully the facts in connection therewith.

If the claim is based upon the ground that the taxpayer was engaged in a trade or business during the taxable year for the first time, a statement must be attached to the claim setting forth in detail the nature of the trade or business, the date on which the first item of income was received therefrom, the date on which the first expenditure was made on account thereof, and the first day of the taxable year on which the taxpayer was engaged in the trade or business.

If the claim is based upon the ground that the taxpayer has changed the annual accounting period for which the return was made, a statement must be attached to the claim setting forth the nature of the change, the reason therefor, and the date on which authority for the change was granted by the Commissioner.

If the claim is based upon the ground that the taxpayer has changed the basis of inventory for the taxable year from that used in the preceding taxable year, a statement must be attached to the claim setting forth in detail the nature of the change, the reason therefor, and the date on which authority for the change was granted by the Commissioner.

If the claim is based upon the ground that the taxpayer has changed the method of computing depreciation allowances, a statement must be attached to the claim setting forth in detail the nature of the change, the reason therefor, and the date on which authority for the change was granted by the Commissioner.

If the claim is based upon the ground that the taxpayer has changed the method of computing depletion allowances, a statement must be attached to the claim setting forth in detail the nature of the change, the reason therefor, and the date on which authority for the change was granted by the Commissioner.

If the claim is based upon the ground that the taxpayer has changed the method of computing amortization allowances, a statement must be attached to the claim setting forth in detail the nature of the change, the reason therefor, and the date on which authority for the change was granted by the Commissioner.

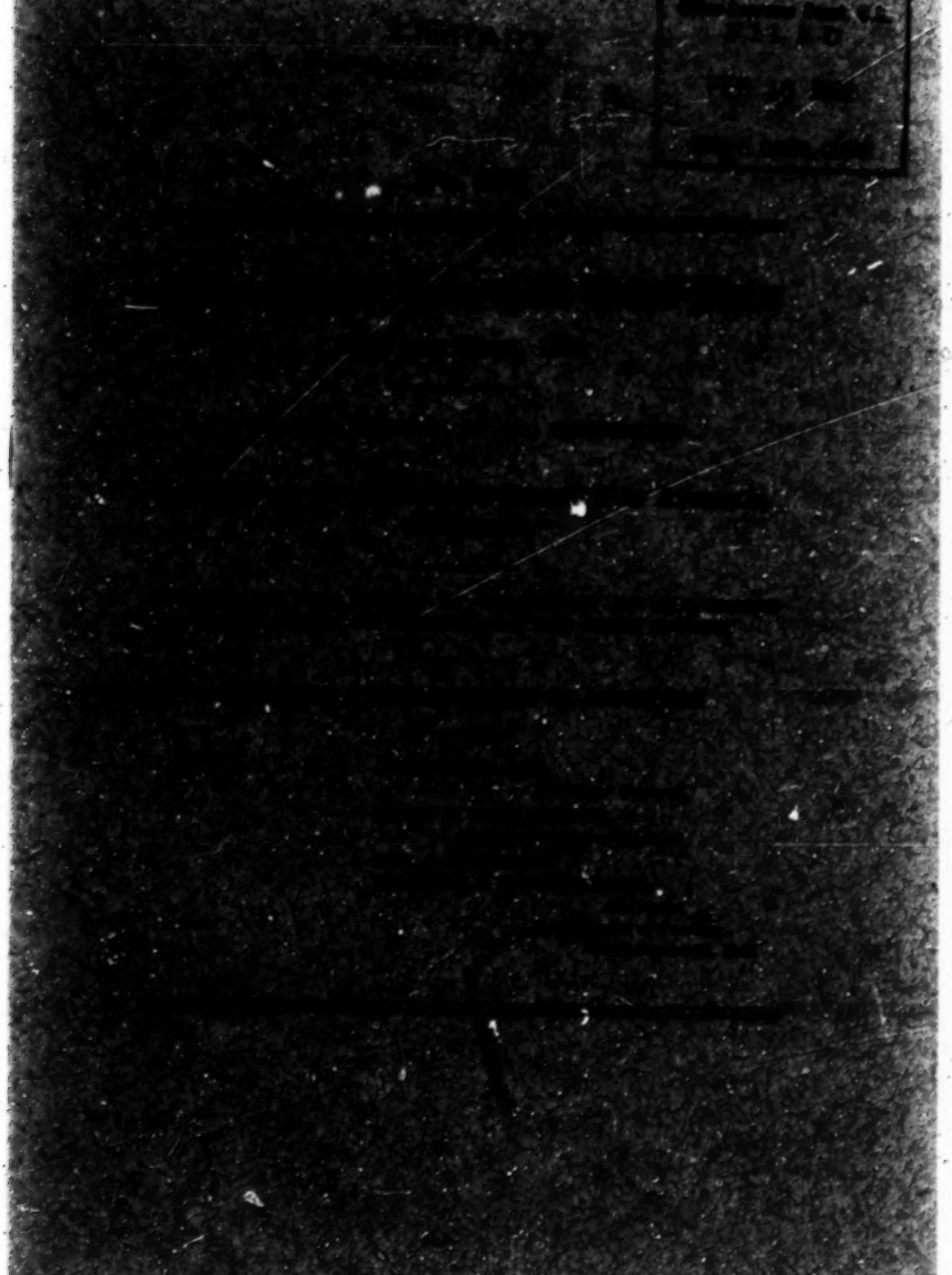
If the claim is based upon the ground that the taxpayer has changed the method of computing the allowance for bad debts, a statement must be attached to the claim setting forth in detail the nature of the change, the reason therefor, and the date on which authority for the change was granted by the Commissioner.

If the claim is based upon the ground that the taxpayer has changed the method of computing the allowance for obsolescence, a statement must be attached to the claim setting forth in detail the nature of the change, the reason therefor, and the date on which authority for the change was granted by the Commissioner.

If the claim is based upon the ground that the taxpayer has changed the method of computing the allowance for depletion, a statement must be attached to the claim setting forth in detail the nature of the change, the reason therefor, and the date on which authority for the change was granted by the Commissioner.

If the claim is based upon the ground that the taxpayer has changed the method of computing the allowance for amortization, a statement must be attached to the claim setting forth in detail the nature of the change, the reason therefor, and the date on which authority for the change was granted by the Commissioner.

If the claim is based upon the ground that the taxpayer has changed the method of computing the allowance for depreciation



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CITATIONS

Cases:

Enochs v. *Williams Packing & Navigation Co., Inc.*, 291 F. 2d 402, writ of certiorari granted this term, No. 493 — 5

Miller v. *Nut Margarine Co.*, 284 U.S. 498 — 4, 5

New Hampshire Fire Ins. Co. v. *Scanlon*, 362 U.S. 404 — 3

Wilmette Park District v. *Campbell*, 338 U.S. 411 — 4

Statutes:

Internal Revenue Code of 1939:

Sec. 1718 (26 U.S.C. 1952 ed., Sec. 1718) — 2, 8

Sec. 3465 (26 U.S.C. 1952 ed., Sec. 3465) — 2

Sec. 3467 (26 U.S.C. 1952 ed., Sec. 3467) — 3, 8

Internal Revenue Code of 1954:

Sec. 4251 (26 U.S.C. 1958 ed., Sec. 4251) — 2

Sec. 4291 (26 U.S.C. 1958 ed., Sec. 4291) — 2, 3, 7, 8

Sec. 6404 (26 U.S.C. 1958 ed., Sec. 6404) — 2, 7

Sec. 6672 (26 U.S.C. 1958 ed., Sec. 6672) — 2, 7, 8

Sec. 7421 (26 U.S.C. 1958 ed., Sec. 7421) — 2, 3, 8

Sec. 7422 (26 U.S.C. 1958 ed., Sec. 7422) — 2, 3, 8

28 U.S.C. 2201 — 3

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 672

JOSEPH PORETTO, ET AL., PETITIONERS

v.

CHESTER A. USRY, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The statement of reasons filed by the district court (Pet. App. 7a) is unreported. The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 295 F. 2d 499.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1961. The petition for a writ of certiorari was filed on January 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the taxpayers are entitled to litigate the merits of a tax assessment through a petition for an order to the Director to show cause why the a ss-

ment should not be abated or suppressed where they failed to show that payment of the assessment would create any hardship and where that payment has now been made.

STATUTES INVOLVED

Sections 4291, 6404(a), 6672, 7421(a) and 7422 (a) and (b) of the Internal Revenue Code of 1954 are set forth in Appendix B, *infra*.

STATEMENT

Joseph Poretto and Joseph Marcello, Jr. (hereinafter referred to as taxpayers), operate a business under the name and style of Nola Printing Company at 530 Iris Avenue, Jefferson Parish, Louisiana (R. 2). On July 22, 1960, taxpayers were notified of an assessment against them by the District Director of Internal Revenue in the amount of $58,979.96. The assessment was made under the penalty provision of Section 6672 of the Internal Revenue Code of 1954 (Section 1718(c) of the 1939 Code) on the determination of the District Director that taxpayers' business constituted a communication facility subject to the provisions of Section 4251 of the 1954 Code and its precursor, Section 3465 of the 1939 Code, and that taxpayers had willfully failed to collect excise taxes for several taxable years ending February 28, 1954, through December 31, 1958, as required by Section 4291 of the 1954 Code and Section 3467(b) of the 1939 Code (R. 2).

The taxpayers allege that a claim for abatement (Pet. App. 17a) was filed unsuccessfully with the Director.

On August 5, 1960, taxpayers filed a petition with the District Court for the Eastern District of Louisiana for the issuance of an order to the District Director to show cause why the assessment should not be abated and suppressed, alleging various wrongful acts by the latter and challenging the factual basis for the assessment (R. 2–6).

On September 16, 1960, the Director filed a motion to dismiss the petition (R. 8–9) on the ground that the district court had no jurisdiction to entertain such a proceeding (1) because it was summary in nature and contrary to the rule announced in *New Hampshire Fire Ins. Co.* v. *Scanlon*, 362 U.S. 404; (2) because there was an adequate remedy at law under Section 7422 of the Internal Revenue Code of 1954; and (3) because maintenance of the action was barred by Section 7421 of the Internal Revenue Code of 1954 and by 28 U.S.C. 2201. This motion was granted by order of the district court dated October 7, 1960 (Pet. App. 7a–8a).

The taxpayers noted an appeal on October 28, 1960. On December 14, 1960, during the pendency of the appeal, the taxpayers paid in full the assessment in question (Affidavit of Vernon R. Kennedy, Chief, Collection Division, New Orleans District Office of Internal Revenue, Appendix A, *infra*).[1] The court of appeals affirmed the order (Pet. App. 1a–6a).

ARGUMENT

The statutory remedy for challenging a tax assessment which the taxpayer believes illegal or excessive

[1] A copy of this affidavit was filed as an appendix to the Director's brief in the court of appeals.

is by a refund suit, after the tax has been paid.[2] As held by the court below (Pet. App. 3a), it is clear that taxpayers will be able to test the merits of the tax here in question in a suit for refund.[3] See *Wilmette Park District* v. *Campbell*, 338 U.S. 411.

In rare instances the courts have entertained suits for equitable relief prior to payment. See *Miller* v. *Nut Margarine Co.*, 284 U.S. 498, 509, where the Court

> recognize[d] the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. * * *

In a careful opinion, the court below has shown the inapplicability of the principle of that decision, stressing that in fact the taxpayers have not shown that the payment of the assessment would create any hardship at all (Pet. App. 5a–6a).[4]

---

[2] An alternative remedy by way of petition to the Tax Court, prior to payment, is provided with respect to income, gift and estate taxes, none of which are here involved.

[3] The instant taxpayers have consistently conceded their ability to pay the tax and in fact did pay it during the pendency of their appeal (Appendix A, *infra*).

[4] In *Enochs* v. *Williams Packing & Navigation Co., Inc.*, 291 F. 2d 402, writ of certiorari granted this Term, No. 493, a majority of a different panel of the court below held that all of the requirements of *Miller* v. *Nut Margarine Co.* were met by the proof and the findings of the district court. The pendency of *Williams Packing* offers no reason for granting review here or for holding this case pending its disposition. In *Williams Packing* the district court found that a levy upon the assets "would have wrecked the corporation and thrown

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
LEE A. JACKSON,
WILLIAM A. FRIEDLANDER,
Attorneys.

FEBRUARY 1962.

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it into bankruptcy as it did not have and does not have assets with which to pay the taxes and not sufficient assets with which it could have negotiated a loan to pay the tax" (291 F. 2d at 406). No such circumstances were claimed or found to exist here. On the contrary, following denial of their petition by the district court, taxpayers paid the assessments. The distinction between the cases is underscored by the fact that Judge Cameron, the author of the *Williams Packing* opinion, concurred in the result in the instant case.

APPENDIX A

Affidavit of Vernon R. Kennedy

State of Louisiana, *Parish of Orleans.*

Before me, M. Hepburn Many, a Notary Public, duly commissioned and qualified in and for the State of Louisiana, Parish of Orleans, and residing therein.

Personally came and appeared: Vernon R. Kennedy, a person of full age, who, being first duly sworn, did depose and say:

That he is the Chief of the Collection Division of the Internal Revenue Service, New Orleans District, and as such has general supervision over the collection of tax revenues for the United States of America in the said New Orleans District.

That Account No. July/60-546500, in the name of Joseph Poretto and Joseph Marcello, Jr., d/b/a Nola News, P.O. Box 10124, New Orleans 21, Louisiana, for excise taxes for the period 2/28/54 through 12/31/58, plus interest and costs, has been paid in full by the taxpayers on December 14, 1960, by a certified check in the sum of $60,376.11, as will be shown by reference to the certificate of assessments and payments, dated January 16, 1961, annexed hereto and paraphed "Ne Varietur" by me, Notary, for identification herewith.

(Signed) Vernon R. Kennedy
Vernon R. Kennedy.

Sworn to and subscribed before me, this 19th day of January, 1961.

(Signed) M. Hepburn Many
M. Hepburn Many—*Notary Public.*

APPENDIX B

Internal Revenue Code of 1954 (26 U.S.C. 1958 ed.):

SEC. 4291 [as amended by Sec. 4(c), Act of July 25, 1956, c. 725, 70 Stat. 644]. CASES WHERE PERSONS RECEIVING PAYMENT MUST COLLECT TAX.

Except as provided in section 4264(a), every person receiving any payment for facilities or services on which a tax is imposed upon the payor thereof under this chapter shall collect the amount of the tax from the person making such payment. For the purpose of this section every club or organization having life members shall collect the tax imposed on life memberships by section 4241.

SEC. 6404. ABATEMENTS.

(a) *General Rule.*—The secretary or his delegate is authorized to abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which—

(1) is excessive in amount, or

(2) is assessed after the expiration of the period of limitation properly applicable thereto, or

(3) is erroneously or illegally assessed.

* * * * * *

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c) and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * * *

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

(b) *Protest or Duress.*—Such suit or proceeding may be maintained whether or not such tax, penalty or sum has been paid under protest or duress.

* * * * * *

The provisions of Sections 3467(b) and 1718(c) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Secs. 3467 and 1718) are substantially similar to the provisions of Sections 4291 and 6672 of the 1954 Code, respectively, set out above.